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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19___

NO. 639

WALTER GROOMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

AT CINCINNATI

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Nashville, Tennessee 37209

Attorney for Petitioner

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OPINIONS BELOW

The orders of the United States District Court for the Eastern District of Tennessee overruling petitioner's motion to dismiss the indictment and the opinion thereto contained in the appendix, infra, Appendix A; the opinion overruling defendant's motion to suppress contained in the appendix, infra, Appendix D; and the opinion of the United States District Court for the Eastern District of Tennessee overruling petitioner's motion for a new trial, contained in the appendix, infra, Appendix E.

The order of the United States Court of Appeals for the Sixth Circuit unreported is printed in the appendix hereto, infra, Appendix B.

The opinion of the United States Court of Appeals for the Sixth Circuit in the case of United States of America vs. Roy Whitehead, (No. 18,607), is printed in the appendix hereto, infra, Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., §1254 (1).

QUESTIONS PRESENTED

1. Whether the verdict against the petitioner Grooms is contrary to the weight of the evidence in that the testimony of the Government agent Reece, as to Reece's identification of petitioner Grooms as the person who allegedly gave Reece and the co-defendant, Williamson, directions to follow in obtaining illegal whiskey, was so contradicted by the testimony of four other persons, one of whom admitted giving the directions as to denying the petitioner's due process of law.

2. Whether the trial court erred by refusing to afford the opportunity to petitioner Grooms to examine the court reporter's notes as to the testimony of agent Reece in the trial of the case of U.S. vs. Billy Bruce Allen, et al, Criminal No. 7071, for the purpose of cross-examination in showing that the testimony of this witness in the instant case was contradictory to his own testimony in the prior case, and whether this error has denied the petitioner of substantial due process of law.

3. Whether the trial court abused its discretion in denying petitioner Grooms' motion for a severance after counsel for Grooms stated to the Court that the co-defendant Whitlock would testify at a severed trial of Grooms that Grooms had no knowledge of co-defendant's alleged criminal activity and that said co-defendant had not corroborated with or sought the assistance of Grooms in the alleged criminal activity, although said co-defendant would not so testify at a joint trial with Grooms because said co-defendant was relying on his Fifth Amendment right against self-incrimination.

4: Whether the court in failing to dismiss the indictment against petitioner Grooms for the reason that the statutes upon which it is based, that is, Chapter 51, Title 26, U.S.C., and particularly Sections 5205 (a) (2) and 5604 (a) (1) could not have been complied with by petitioner Grooms in Cooke County, Tennessee, without incriminating himself with respect to Titles 39 and 57 of the Tennessee Code and in violation of the Fifth Amendment of the Constitution of the United States.

REASON WHY CERTIORARI SHOULD BE GRANTED

It is petitioner's contention that the Supreme Court should grant certiorari in this case for two reasons: (1) It is important that the question concerning the constitutionality of certain of the section of the Internal Revenue Code relating to registration and stamping be settled for all time. Most especially, in light of the recent cases of Marchetti vs. United States, 88 S. Ct. 697, Grosso vs. United States, 88 S. Ct. 709 and Haynes vs. United States, 88 S. Ct. 722; (2) In this case the evidence against the petitioner Grooms is so weak, taking all facts and circumstances into consideration, that to allow the conviction to stand would be a gross miscarriage of justice.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment V:

No person shall be *** nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;...

14th Amendment §1:

...nor shall any State deprive any person of life, liberty, or property, without due process of law;...

Title 26, U.S.C.:

"§5205. STAMPS (a) STAMPS OR CONTAINERS OF DISTILLED SPIRITS.--(2) CONTAINERS OF OTHER DISTILLED SPIRITS.--

No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter."

"§5604. PENALTIES RELATING TO STAMPS, MARKS, BRANDS, AND CONTAINERS (a) GENERAL.--Any person who shall--(1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section; or ..."

Title 39, Tennessee Code:

"39-2523. ATTEMPT TO MANUFACTURE INTOXICATING LIQUOR.--The offenses described in §§39-2521, 39-2522 shall be deemed to have been committed by any person who shall attempt to manufacture intoxicating liquor, either by assembling the necessary apparatus for the purpose of manufacturing intoxicating liquor as prohibited by law, or by doing any act preparatory to such manufacture; and any such attempt shall be punished as described in §39-2522. [Acts 1923, ch. 14, §2, Shan. Supp., §6793a24b1; mod. Code 1932, §11248.]"

"39-2524. POSSESSION OF A STILL--PENALTY.--It shall be unlawful for any person to have in his possession or control any still or other apparatus, or part thereof, used or intended to be used for the purpose of manufacturing intoxicating liquor as prohibited by law, and any person convicted of a violation of this section shall be deemed guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), and by confinement in the county jail or county workhouse for a period of not more than one (1) year in the discretion of the trial court. [Acts 1923, ch. 12, §1; Shan. Supp., §6798a25b1; mod. Code 1932, §11249.]"

"39-2525. POSSESSION OF STILL AS PRIMA FACIE EVIDENCE OF PURPOSE.--When any person is found in the possession or control of any still or apparatus, or part thereof, suitable or designed for the manufacture of intoxicating liquor, such possession or control shall be deemed prima facie evidence in a prosecution under §§39-2521-39-2524 that such possession or control was for the purpose of manufacturing intoxicating liquor as prohibited by law. [Acts 1923, ch. 12, §2; Shan. Supp., §6798a25b2; Mod. Code 1932, §11250.]"

STATEMENT OF THE CASE

A two count indictment was filed against petitioner Grooms on April 4, 1969. Count one charged a violation of Title 18, Sec. 371, U.S.C., in that petitioner Grooms and three co-defendants conspired to defraud the United States by selling distilled spirits in violation of Title 26, United States Code, Sec. 5604 (a) (1).

Count two charged petitioner Grooms and the three co-defendants with selling a quantity of distilled spirits in violation of Title 26, U.S.C., Sec. 5604 (a) (1).

Petitioner Grooms adopted a motion to dismiss previously filed on behalf of a co-defendant, Clayton Williamson (Tr. 5). Said motion prayed for a dismissal of the indictment as to both counts against him on the ground that his compliance with the registration requirements of 26 U.S.C., Sections 5179 and 5601 (a) (1), and the stamping requirements of 26 U.S.C., Secs. 5205 (a) (2) and 5604 (a) (1), would have required him to have incriminated himself in a potential criminal action under the laws of Tennessee. Said motion had previously been overruled by memorandum opinion and order by the trial judge (Appendix A), who ruled that his action on petitioner Grooms' motion was the same.

Each defendant entered a plea of not guilty and the case was tried by jury. After the Government presented its evidence, petitioner Grooms made motions for severance and judgment of acquittal, which motions the trial court was pleased to overrule.

Subsequently the jury found each defendant guilty as charged in the two count indictment.

Thereafter petitioner Grooms was sentenced to two years confinement on count two of the indictment and was placed on probation for five years on count one. Petitioner Grooms filed a motion for a new trial which the Court was pleased to overrule and the case was appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit, on July 2, 1970, denied the appeal, whereupon the petitioner seeks redress through the Writ of Certiorari.

STATEMENT OF FACTS

The Government's chief evidence consisted of the testimony of William Reece, a Federal ATU agent. Reece testified that he and co-defendant Williamson drove to petitioner Walter Grooms' house, pulled off the highway, and were approached by petitioner Grooms, who told them to go to the top of the hill and he would send "it" on up. Reece testified further that he drove to the top of said hill and there purchased untaxed whiskey from co-defendant Drury Whitlock. Agent Reece's lengthy narrative of events touched petitioner Grooms at one point only, at Tr. 31-32:

"Q. (By Mr. Dillard) All right, sir, what happened when you got to the residence of Mr. Grooms?

A. Sir, we pulled up right off the highway at the edge of his--down from his house, and Mr. Grooms came out to the car and told us that--instructed Mr. Williamson to drive up to the top of the hill and wait at the chain and that he would send the whiskey up. Excuse me, he said he would send it on up.

Q. Send it on up?

A. Send it on up.

Q. After he gave you these instructions, what, if anything, happened?

A. Mr. Williamson then questioned him as to the location of the chain, and Mr. Grooms further explained it was up the mountain and around the curve there was a dirt road off to the right. Mr. Williamson and I left and went up there and found the road and parked."

On the basis of these few words he allegedly spoke, petitioner Grooms was convicted of both a conspiracy and a substantive offense, although numerous witnesses testified the incriminating words were spoken by petitioner Grooms' brother.

PROPOSITION I

The verdict against petitioner Grooms is contrary to the weight of evidence, in that the testimony of the Government agent, Reece, as to Reece's identification of petitioner Grooms as the person who allegedly gave Reece and co-defendant Williamson directions to follow in obtaining illegal whiskey, was contradicted by the testimony of four other persons, one of whom admitted giving the directions himself.

At Tr. 137, Leroy Grooms, the brother of petitioner Walter Grooms, testified that he was working on a car at Walter's residence when he, Leroy, made the statements which were attributed to the petitioner Grooms as the sole basis for his guilt:

"Q. (By Mr. Quillen) Was there any conversation that took place there between you and Pee Woody (co-defendant Williamson) in the presence of some other men?

A. Pee Woody asked me where Drury Whitlock was at, and I told him Drury said to meet him up at the gate there, and if he was [not] there, he would be there soon. Pee Woody asked me how to get up to the mountain, and I told him about half a mile up the mountain, to the right there was a gate up to the right there.

***

Q. Had you previously had some conversation with Drury Whitlock about that?

A. Drury drove up where we and his boy were working on the car and said, 'If Pee Woody comes along, tell him he would be up on the mountain on the right at the gate.'"

At Tr. 153 et cet. Homer Whitlock testified that he was present at the time in question, that petitioner Grooms was not present, and that Leroy Grooms talked with co-defendant Williamson and another man when the men pulled up in their

automobile. On cross-examination Whitlock testified in part as follows, at Tr. 155:

"A. I didn't really remember the incident until they was, you know, telling me about when Drury come and asked--Drury first come up and said if anybody comes looking for him, he would be up at the game, and he would be there in a few minutes, and for Leroy to tell him he would be there, and to come and meet him, that he would be up there. There is how I remembered the date. Really I don't remember what day it was, but that is the only day I was up there when anybody come along and asked for him.

Q. (By Mr. Dillard) Drury told you to tell Pee Woody to come up to the gate?

A. He said--he didn't say Pee Woody. He said, 'If anybody comes along looking for me, I'll be up at the gate, and if I ain't, I'll be up there in a few minutes.'"

Co-defendant Williamson took the stand and testified that he did indeed drive agent Reece to pick up some illegal whiskey and that they obtained directions from Leroy Grooms, not the petitioner Walter R. Grooms. At Tr. 208 Williamson testified in part as follows:

"A. Yes, along about where I thought Drury lived there was four or five people working on a car. So, I stopped and said, 'Where is Drury at?' Leroy Grooms come down and he said, 'If anybody comes and asked him, to go on up on the mountain to the gate.' I said, 'Where is that at?' He said, 'Up there about half a mile or a mile up there, and there is a gate that goes up in the woodland.'

Q. (By Mr. Dugger) Did you go on up to the gate?

A. Yes, sir, I did.

Q. Then, what happened there?

A. I waited, I don't know, I would say 15 or 20 minutes, something like that, and Drury come.

Q. And was the whiskey then unloaded from Drury's car into Reece's car?

The petitioner Walter R. Grooms testified at Tr. 118, et cet. that he had had no part in the criminal activity charged and that he had never seen agent Reece until his arrest six weeks after the alleged incident.

Petitioner Grooms submits that it is manifestly in the interest of justice that his conviction be reversed. Agent Reece is only one man and could easily have mistaken Leroy Grooms for his brother, the petitioner. The positive testimony of two other unrelated witnesses evidences a sufficiently strong probability that such mistake was made to warrant a reversal. Additionally, a state agent, Sisle Ray, called by the Government, testified at Tr. 229, that he had mistaken Leroy Grooms for petitioner Walter Grooms about six months prior to trial, although he had known Walter Grooms for a number of years.

PROPOSITION II

The Court erred by refusing to afford the opportunity to petitioner Grooms to examine the court reporter's notes of the testimony of agent Reece in the trial of the case of U.S. vs. Billy Bruce Allen, et al., Criminal No. 7071, for the purpose of cross-examination and showing that the testimony of this witness in the instant case was contradictory to his own testimony in the prior case.

Agent Reece testified in the instant case that he preliminarily negotiated for the alleged sale of whiskey with co-defendant Allen in a tavern on the night of January 15, 1969. Allen's evidence was that there were no such negotiations and that agent Reece was intoxicated and drinking from a "half pint bottle of Seagram's Seven Crown Whiskey." Tr. 47.

At Tr. 47-48 agent Reece admitted knowledge of said "Seagram's" bottle:

"Q. (By Mr. Quillen) During that entire one hour and a half period, did you see a half pint bottle of Seagram's Seven Crown Whiskey sitting there?

A. Yes, sir, there was a bottle sitting on the table.

Q. Whose bottle was that?

A. I am not sure. It was there when I arrived.

Q. Did you pour anything to drink out of that bottle?

A. Not that I recall."

In the prior case referred to above, agent Reece testified as to the events of this same evening and denied any knowledge of the "Seagram's" bottle:

"Q. Did you have a bottle of Seagram's Seven Crown liquor?

A. No, sir.

Q. You didn't see that?

A. No, sir."

(The above testimony is found on p. 9 of the transcript entitled REBUTTAL TESTIMONY OF WILLIAM M. REECE, MAY 6, 1969, which transcript accompanied petitioner Grooms' motion for a new trial.)

Impeachment of agent Reece's testimony was crucial to petitioner Grooms, since Reece was the only material witness against him. Therefore petitioner Grooms submits that the court erred in refusing to permit him to obtain the contradictory testimony set out above.

Petitioner Grooms' contention is supported in principle by the case of Melton vs. U.S., 398 F. 2d 321 (10th Cir., 1968), in which a conviction was reversed because the defendant was not allowed to obtain the grand jury transcript to impeach a government witness by showing inconsistent testimony:

> "In support of the motion for inspection defense counsel said that the grand jury transcript "will give us an opportunity to esfablish an inconsistency." Although the precise language of Cargill vs. U.S., 381 F. 2d 849, is not followed, the purpose of showing an inconsistency is to impeach or test credibility. We believe that the Cargill particularized need test is satisfied."

See also Dennis vs. U.S., 384 U.S. 855 (1966).

The Court erred in denying petitioner Grooms' motion for a severance after counsel for Grooms stated to the Court that a co-defendant, Whitlock, would testify at a severed trial of Grooms that Grooms had no knowledge of that co-defendant's alleged criminal activity and that said co-defendant had not collaborated with or sought the assistance of Grooms in the alleged criminal activity, although said co-defendant would not so testify at a joint trial with Grooms because said co-defendant was relying on his Fifth Amendment right against self-incrimination.

In courts around the country it has become the practice to join numerous defendants and offenses together in one trial. Realizing that such procedure often achieves speedy and less expensive trials while threatening fairness and justice, the following minimum standards of criminal justice were submitted by the Advisory Committee of the American Bar Association in September, 1967, Section 2.3:

"...(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during the trial upon consent of the several defendants, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant."

Petitioner Grooms submits that this situation comes within the spirit of the above recommendation. The evidence placed him only on the fringe of the alleged criminal activity;

he was never seen in the presence of any whiskey, and the only conduct attributed to him was the giving of directions to agent Reece and co-defendant Williamson. Petitioner Grooms was necessarily prejudiced by being tried together with three other defendants, against whom almost all of the evidence was directed.

Petitioner Grooms' contention is supported by the case of U.S. vs. Branker, 395 F. 2d 881 (2nd Cir., 1968), in which the conviction of several "fringe" defendants was reversed because the defendants were not granted a severance from the "central" defendants in the alleged criminal activity.

Additionally, defense counsel advised the court that petitioner Grooms would be deprived of the exonerating testimony of co-defendant Whitlock if the two were tried together, since Whitlock intended not to testify in his own behalf but would so testify at a severed trial of defendant Grooms. The Government's theory was that petitioner Grooms sent the whiskey to agent Reece by way of Whitlock. Petitioner Grooms supported his motion for a new trial in the trial court with an affidavit by Whitlock which completely exonerated petitioner Grooms.

PROPOSITION IV.

The Court erred in failing to dismiss the indictment against petitioner Grooms for the reason that the statutes upon which it is based, that is, Chapter 51, Title 26, U.S.C., and particularly Sections 5205 (a) (2) and 5604 (a) (1) could not have been complied with by petitioner Grooms in Cocke County, Tennessee, without incriminating himself with respect to Titles 39 and 57 of the Tennessee Code and in violation of the Fifth Amendment of the Constitution of the United States.

In support of this proposition petitioner Grooms is relying upon the cases of Marchetti vs. U.S., supra, Grosso vs. U.S., supra, and Haynes vs. U.S., supra, with all of which

CONCLUSION

For the foregoing reason, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner,
Walter Grooms

APPENDIX

FILED: 5/20/69

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF TENNESSEE

NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

VS. CRIMINAL ACTION NO. 7073

WALTER R. GROOMS,
DRURY WHITLOCK,
CLAYTON WILLIAMSON,
BILLY BRUCE ALLEN,
Defendants

MEMORANDUM OPINION AND ORDER

The defendant Clayton Williamson moved on April 28, 1969, for a dismissal of the indictment as to both counts against him on the ground that his compliance with the registration requirements of 26 U.S.C. §§ 5179 and 5601 (a)(1), and the stamping requirements of 26 U.S.C. §§ 5205 (a)(2), and 5604 (a)(1), would have required him to have incriminated himself in a potential criminal action under the laws of Tennessee.

There is no merit to the defendant's contentions. He is charged in the first count of the indictment herein with unlawfully conspiring to defraud the United States by selling distilled spirits required to be stamped under the provisions of 26 U.S.C. § 5205(a)(2), the immediate containers of which did not have affixed thereto the necessary stamps indicating

compliance with the provisions of Chapter 51, Title 26, United States Code, in violation of 26 U.S.C. § 5604 (a)(1). He is further charged in the second count of the indictment herein with selling or aiding and abetting in selling, distilled spirits required to be stamped as described in the first count. The defendant was not required by federal law to affix to immediate containers of distilled spirits stamps indicating the determination of the tax thereon or evidencing compliance with the federal internal revenue laws relating to liquor. Rather, he was proscribed by federal statute from selling such distilled spirits in containers bearing such stamps to which neither he nor anyone else had affixed stamps, or from aiding or abetting such sale.

The defendant's motion of April 28, 1969, accordingly is hereby

DENIED. United States v. Henry Hardy Buckner, et al., criminal action no. 7030, Nov. 29, 1968, this district, this division. United States v. David Bruce Baxter, et al., criminal action no. 7071, May 6, 1969, this district, this division.

ENTER:

/s/ C. G. NEESE
United States District Judge

APPENDIX B

No. 20,204

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
JUL 2 1970
CARL W. REUSS, CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WALTER R. GROOMS,
Defendant-Appellant.

O R D E R

Before: McCREE and BROOKS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge

Following a jury trial the defendant-appellant appeals his conviction for conspiring to violate and violating the Internal Revenue Laws. (Title 18 U.S.C. §371 and Title 26 U.S.C. §5604 [a][1]). He complains (1) the evidence is insufficient to support his conviction; (2) of the denial of permission to examine the court reporter's notes of another case; (3) of failure to grant him severance; and (4) of the unconstitutionality of the Internal Revenue Laws. We have considered all of these issues and conclude they are without merit and that defendant was afforded a fair trial free of any

prejudicial error.

Affirmed.

Entered by order of the Court

Carl W. Reuss

Clerk

APPENDIX C

No. 18607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROY WHITEHEAD, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided March 3, 1970.

Before: PHILLIPS, Chief Judge, WEICK, EDWARDS, CELEBREZZE, PECK, McCREE, COMBS, BROOKS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge

EDWARDS, Circuit Judge. This appeal presents constitutional issues upon which panels of this court have been divided. It was selected by the court *sua sponte* for in banc consideration. It was reargued before the entire bench in the December 1969 term of the court. The fundamental question presented is whether the Fifth Amend-

ment bars appellant's conviction on an indictment charging violations of the federal alcohol tax laws. We hold that it does not.

Appellant was convicted on seven counts of an eight-count indictment and sentenced to concurrent terms totaling four years. The counts charged appellant with possession, custody and control of a still, the making of mash, the transportation of raw materials to an unlawful distillery, and the possession of distilled spirits, all in violation of the federal tax laws.[1]

The record discloses extensive surveillance of the house in Detroit, Michigan, where ultimately the still and 800 gallons of mash were found. Appellant was seen going into the house carrying 60-pound sacks of sugar and coming out with paper bags containing something heavy and loading same in cars. Two such cars were stopped by Internal Revenue agents. Appellant, who was driving one of them, was arrested. Both cars were found to be loaded with nontax-paid whiskey. Thereupon a search warrant was procured for the house, the still was found, and appellant was indicted.

Appellant contends that the evidence was insufficient to sustain conviction on several counts, including Count 6 pertaining to the making of mash. He also contends that various provisions of the federal tax laws violated his Amendment rights under Supreme Court decisions in the *Marchetti*,[2] *Grosso*,[3] and *Haynes*[4] cases.

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1. 26 U.S.C. §§ 5173(a), 5601(a)(4), 5205(a)(2), 5179(a), 5601(a)(1), 5222(a)(1), 5601(a)(7), 5178(a)(1)(B), 5601(a)(6), 5180(a), 5681(c) (1964).

2. *Marchetti* v. *United States*, 390 U.S. 39 (1968).

3. *Grosso* v. *United States*, 390 U.S. 62 (1968).

4. *Haynes* v. *United States*, 390 U.S. 85 (1968).

We believe that the evidence of appellant's activity in and about the premises were acts which represented much more than presence at the site of a still (*see United States* v. *Romano*, 382 U.S. 136 (1965)) or assistance in only one phase of an illegal liquor business (*see Bozza* v. *United States*, 330 U.S. 160 (1947)). Appellant was seen engaged in activities from which the jury could have inferred that he was carrying supplies for illegal manufacture of liquor into a house and carrying the illegal liquor out. He was arrested while driving an automobile which contained illicit whiskey which the jury had every right to infer was a product of an illegal still operated by appellant.

As to the count which alleged illegal manufacture of mash, appellant was seen carrying heavy bags of sugar into the house where subsequently the still and some distilled liquor were found. The sugar bags were found empty in a closet in the house. Eight hundred gallons of mash were also found there.

All in all, there was both direct and circumstantial evidence from which the jury could have inferred appellant's guilt on all counts beyond a reasonable doubt. *Ramsey* v. *United States*, 248 F.2d 740 (6th Cir. 1957); *Chadwell* v. *United States*, 260 F.2d 257 (6th Cir. 1958).

Turning to the constitutional issue, we note that appellant herein did not seek to raise the Fifth Amendment privilege at trial. Nonetheless, we do not consider the privilege to have been waived in this case and we elect to decide this issue on its merits. *See Grosso* v. *United States*, 390 U.S. 62, 63, 70, 71, (1968); *Drennon* v. *United States*, 393 F.2d 342 (8th Cir. 1968); *Greenwood* v. *United States*, 392 F.2d 558 (4th Cir. 1968); *United States* v. *Manfredonia*, 391 F.2d 229 (2d Cir. 1968); *Harris* v. *United States*, 390 F.2d 616 (8th Cir. 1968); *but see Howard* v. *United States*, 397 F.2d 72 (9th Cir. 1968).

We are urged to hold these tax measures unconstitutional in that they require the performance of certain affirmative acts; here, the posting of a sign at the site of a lawful distillery, the furnishing of bond, the purchase and affixing of tax stamps and the filing of registration information. Appellant asserts that these affirmative acts might create for some prospective taxpayers in some possible situations "hazards of incrimination . . . [which] are not trifling or imaginary." *Marchetti* v. *United States*, 390 U.S. 39, 54 (1968).

At the outset we emphasize that we do not read these words as having been written as a litmus paper test of constitutionality. It is "compelled" self-incrimination against which the Fifth Amendment has been held to offer protection. Every criminal act, no matter how voluntary, creates some real hazard of incrimination. And where regulatory legislation provides penalties for failure to perform certain acts normally the Fifth Amendment does not apply because the omission is not deemed "compelled."

We do not think that the Supreme Court has as yet provided a wholly clear rationale for distinguishing constitutional exercise of taxing and regulatory powers from those situations wherein fatal Fifth Amendment conflicts are to be found. In such a situation we would proceed with some caution and with strict construction of the case holdings if the issue involved appeared to be in doubt. In our instant case, however, we believe there is no reason for doubt.

There are clear and important distinctions between the currently disputed provisions of alcohol tax statutes and those statutory provisions which were held vulnerable to attack on Fifth Amendment grounds in the *Marchetti*, *Grosso* and *Haynes* cases. (*See also Leary* v. *United States*, 395 U.S. 6 (1969)).

Underlying the series of cases to which we have referred is the Supreme Court's holding in *Albertson* v. *SACB*, 382 U.S. 70 (1965). The Supreme Court there distinguished between the *Sullivan* case (*United States* v. *Sullivan*, 274 U.S. 259 (1927)) which upheld as constitutional the requirement of filing an income tax return, and an order requiring a Communist to register as such and thus furnish evidence of his violation of two federal criminal statutes.

In *Albertson* the Supreme Court said:

> "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." *Albertson* v. *SACB*, *supra* at 79.

The Public Purpose

The alcohol tax laws are "essentially noncriminal" revenue measures. Until the Sixteenth Amendment to the United States Constitution (income tax), taxes on alcoholic beverages provided the fundamental financing of the United States government.

Even after enactment of the federal income tax, the alcohol tax laws constitute substantial revenue producing measures.

As the Fourth Circuit has noted:

> "In 1966, the taxes on distilled spirits produced $3.7 billion in internal revenue. The wagering tax

scrutinized in *Marchetti* produced 'in the past several years' only $115 million. 390 U.S. at 82, 88 S.Ct. at 721.

> "We think the failure of these defendants to designate place of manufacture and to post a distillery bond is due to their wish to avoid the federal tax of $10.50 per gallon on distilled spirits. The evasion of tax alone provides the enormous margin of profit in the white whiskey business and accounts for the delinquency here. It lies well within the power of Congress to exercise a regulatory function to enforce the collection of such lawfully due taxes." *United States* v. *Walden*, 411 F.2d 1109, 1112 (4th Cir. 1969). (Footnote omitted.)

In a preprohibition case, the United States Supreme Court provided this description of the alcohol tax laws of that day — a description which we feel entirely appropriate to describe the statute currently under attack:

> "It is clear, even upon a cursory reading, that the well-considered and minute provisions of the Revised Statutes found in chapter 4, entitled 'Distilled Spirits,' of Title XXXV., entitled 'Internal Revenue,' were adopted with one purpose only, namely, to secure the payment of the tax imposed by law upon distilled spirits.
>
> "All the regulations for the manufacture and storage, the marking, branding, numbering, and stamping with tax stamps, of distilled spirits, and all the penalties, forfeitures, fines, and imprisonments prescribed by the chapter mentioned, have that end only in view. If the tax on distilled spirits were repealed, all the ingenious and complicated provisions of the chapter would become useless and insensible." *United States* v. *Ulrici*, 111 U.S. 38, 40 (1884).

Returning to the language of *Albertson*, the statutory provisions here attacked are "neutral on their face and directed at the public at large." The manufacture of alcoholic beverages is lawful under some circumstances in all 50

states and the District of Columbia and the taxes are collected from thousands of persons engaged in lawful sale and distribution of these products.

The Fifth Circuit has expressed this view in a case upon which the Supreme Court has already denied certiorari:

> "Perhaps if this prosecution had occurred under an appropriate statute that existed during the short life of the Eighteenth Amendment to the United States Constitution, appellants could properly equate their situation to the appellants in Marchetti. As it is, however, we are informed by the government's brief, and it is not disputed, (a matter of which we can take judicial notice) that possession of distilled spirits is legal to some extent in every one of the fifty states of the union. Therefore, we find ourselves in agreement with those district courts in addition to the trial court here, which have held that there is no danger of self incrimination resulting from the requirement of Sections 5205(a)(2) and 5604(a)(1) relating to the placing of stamps and taxing of distilled spirits." *Brown* v. *United States*, 401 F.2d 769, 770 (5th Cir. 1968), *cert. denied*, 394 U.S. 962 (1969).

The Effect on the Individual

Regardless, however, of what we have written thus far pertaining to the purpose of the alcohol tax laws, appellant would argue that the Fifth Amendment privilege depends upon no such balancing of rights and is absolute as to him. We cannot perceive, however, how the affirmative acts here objected to can be held to represent compelling this appellant "in any criminal case to be a witness against himself." U.S. Const. amend. V. Contrary to the facts in the *Albertson* case, these statutory provisions are not aimed at exposing "a highly selective group inherently suspect of criminal activities" to prosecution under other criminal stat-

utes. Nor do we find here a compelled response which might involve "the admission of a crucial element of a crime."

These statutes do apply generally to all who manufacture liquor, including many persons or organizations who do so entirely lawfully within the State of Michigan. We find here no purpose to aid state officialdom in suppressing activities generally rendered illegal by state law. *Cf. Marchetti* v. *United States, supra*; *Grosso* v. *United States, supra.*

We certainly do not find here that "Congress intended information obtained as a consequence of [the requirements of these statutes] to be provided to interested prosecuting authorities." *Marchetti* v. *United States, supra* at 58, 59.

Nor do we find that these statutes have "an obvious purpose . . . to coerce evidence from persons engaged in illegal activities for use in their prosecution." *Grosso* v. *United States, supra* at 74 (concurring opinion).

Indeed, the alcohol tax statutes were drafted with the purpose of keeping persons of ill-repute out of the alcohol beverage manufacturing business. *Seaway Beverages, Inc.* v. *Dillon*, 319 F.2d 722 (D.C. Cir.), *cert. denied*, 375 U.S. 923 (1963). And these federal statutes — in place of seeking to expose a limited class of law violators to state prosecution (*Cf. Marchetti, Grosso* and *Haynes*) — prohibit issuance of a basic permit upon a finding "that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted." 27 U.S.C. § 204(a)(2)(C) (1964).

Absent the prior securing of the basic permit on a showing of compliance with state law, it is greatly to be doubted that any other of the affirmative acts required as a prerequisite to legal manufacture of alcoholic beverages under fed-

eral law (*i.e.*, posting of bond, securing and posting of a distillery sign, securing and affixing of tax stamps) could actually be performed.

For example, Title 27 §203 makes it unlawful to manufacture, ship or sell any distilled spirits, except pursuant to the basic permit referred to above. And appellant in this case (if we hypothesize his ability to show compliance with state law) could not have received such a basic permit to manufacture distilled spirits on the premises involved in this case because 26 U.S.C. §5178 flatly prohibits such a plant "in any dwelling house."

The possibility of appellant's self-incrimination by dint of actual compliance with the statutory provisions attacked herein is considerably less than "purely hypothetical." *Cf. Minor* v. *United States*, —— U.S. (1969). (Decided Dec. 8, 1969, Slip op. p. 10).

In summary, the statutory provisions attacked in this appeal are a far cry from the statutory provisions invalidated in *Marchetti, Grosso* and *Haynes* which the Supreme Court held deliberately sought to expose federal registrants to state prosecution. Here federal registration is prohibited unless the registrant is in compliance with state law. This appellant could not, if he had tried, have gotten his name on any list of federal registrants because that list was a list of lawful distillers under both state and federal laws and not as in *Marchetti* and *Grosso* a list of gamblers whose activities were illegal under state law. Judge McCree's dissent suggests that appellant might have "attempted" registration and in effect told the federal authorities of his intention to make white whiskey in residential premises. Since there would have been no conceivable federal statutory benefit from such a disclosure, we cannot perceive how it could be deemed "compelled" in any Fifth Amendment sense.

We find no abuse of appellant's Fifth Amendment rights.

While this is a case of first impression in this court, we are by no means plowing new ground in the federal law. Three circuits and many District Courts have already reached the same conclusion. *United States* v. *Fricano*, 416 F.2d 434 (2d Cir. 1969); *United States* v. *Walden*, 411 F.2d 1109 (4th Cir. 1969); *Wilson* v. *United States*, 409 F.2d 604 (5th Cir.), *cert. denied*, 395 U.S. 923 (1969); *Thornburg* v. *United States*, 406 F.2d 1060 (5th Cir. 1969); *Grant* v. *United States*, 407 F.2d 56 (5th Cir. 1969); *Hall* v. *United States*, 407 F.2d 1320 (5th Cir. 1969); *United States* v. *Ellington*, 406 F.2d 348 (5th Cir. 1969); *Shoffeitt* v. *United States*, 403 F.2d 991 (5th Cir. 1968), *cert. denied*, 393 U.S. 1084 (1969); *Anderson* v. *United States*, 403 F.2d 206 (5th Cir. 1968); *Brown* v. *United States*, 401 F.2d 769 (5th Cir. 1968), *cert. denied*, 394 U.S. 962 (1969); *United States* v. *Young*, 284 F. Supp. 1008 (E.D. Tenn. 1968); *United States* v. *Richardson*, 284 F. Supp. 419 (M.D. Ala. 1968); *United States* v. *McGee*, 282 F. Supp. 550 (M.D. Tenn. 1968). *Contra*, *United States* v. *Fine*, 293 F. Supp. 189 (E.D. Tenn. 1968).

The judgment of the District Court is affirmed.

McCREE, Circuit Judge (dissenting in part). I would affirm appellant's conviction on count 6 for making and fermenting mash on premises not lawfully qualified for the production of distilled spirits in violation of 26 U.S.C. §§ 5222(a)(1) and 5601(a)(7) and on count 7 for aiding and assisting in the use of a still for the production of distilled spirits in a dwelling house in violation of 26 U.S.C. §§ 5178(a)(1)(B) and 5601(a)(6). Appellant's only objection to his convictions on these counts is directed to the sufficiency of the evidence to uphold these convictions, and I agree that the evidence is sufficient to uphold them.

I would, however, reverse appellant's convictions on count 1 for carrying on the business of a distiller without giving bond in violation of 26 U.S.C. §§ 5173(a) and 5601(a)(4); on counts 3 and 4 for possessing and transporting distilled spirits in containers not having affixed thereto the required venue stamps in violations of 26 U.S.C. §§ 5205(a)(2) and 5604(a)(1); on count 5 for possessing an unregistered still in violation of 26 U.S.C. §§ 5179(a) and 5601(a)(1); and on count 8 for carrying and delivering raw materials to an unlawful distillery at which no sign was posted in violation of 26 U.S.C. §§ 5180(a) and 5681(c). I would reach this result because appellant's refusal to comply with the statutory requirements upon which these convictions are based was a proper exercise of his fifth amendment privilege against self-incrimination and therefore he may not be criminally punished for his failure to comply. *See Marchetti* v. *United States*, 390 U.S. 39, 61 (1968).

The fifth amendment provides, in pertinent part, that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In a series of recent decisions involving the relationship between this privilege and the Government's right to require a person, upon threat of criminal prosecution, to provide potentially incriminating information, the Supreme Court has decided that "The *central standard* for the privilege's application [is] whether the claimant is confronted by substantial and 'real,' not merely trifling or imaginary, hazards of incrimination." *Marchetti* v. *United States, supra* at 53 (emphasis added). *Accord, Grosso* v. *United States*, 390 U.S. 62 (1968); *Haynes* v. *United States*, 390 U.S. 85 (1968); *Leary* v. *United States*, 395 U.S. 6 (1969). If the obligation to provide information creates "'real and appreciable', and not merely 'imaginary and unsubstantial,' hazards of self-incrimination," a person cannot be criminally

punished for refusing to comply. *Marchetti* v. *United States*, *supra* at 48.

At the outset, it should be observed that this standard renders inapposite one of the factors relied on by the majority to distinguish *Marchetti*, *Grosso*, *Haynes* and *Leary* from the present case. For example, the majority points out that the alcohol tax laws are "essentially non-criminal revenue measures" and that the purpose of the disclosure provisions is to facilitate securing the payment of the taxes imposed and not to aid law enforcement officials in their efforts against illegal manufacturers of distilled spirits. However, regardless of the Congressional purpose for inclusion of the disclosure provisions in the alcohol tax laws, the refusal to comply with these provisions cannot be criminally punished if compliance would create substantial and real hazards of self-incrimination. *See generally Counselman* v. *Hitchcok*, 142 U.S. 547, 585 (1892).[1] The question before us, then, is whether appellant ". . . may be compelled to give evidence against himself." *Marchetti* v. *United States*, *supra* at 51.

Considering the substantiality of the risk of self-incrimination if appellant complied with the disclosure provisions of the alcohol tax laws, the majority concludes that the degree of risk involved is "considerably less than 'purely hypothetical'" (1) because the disclosure provisions are "directed at the public at large" and not "at a highly selective group inherently suspect of criminal activities", *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965), and (2) because it is doubtful, in any event, whether appellant would ever have the opportunity to perform the affirmative acts of disclosure.

1. It is interesting to speculate on the effect on the privilege against self-incrimination of a doctrine which would permit infringement of the privilege if occasioned by a legitimate Congressional purpose, since the suppression of criminal activity, in certain areas, would be a legitimate Congressional purpose.

Admittedly, compliance with a statutory provision requiring the disclosure of illegal activity creates a greater risk of self-incrimination when the disclosure requirement is directed at a "group inherently suspect of criminal activities," since it identifies the discloser as a member of the suspect group. *Leary* v. *United States*, *supra* at 18. *See also Marchetti* v. *United States*, *supra* at 57; *Grosso* v. *United States*, *supra* at 68. However, the character of the group subject to a disclosure requirement certainly is not by itself determinative of the substantiality of the risk of self-incrimination attendant on compliance with such a requirement. Even if the requirement is not directed at an inherently suspect group, the risk encountered as a consequence of compliance may still be "real and appreciable".

Indeed, manufacturers of distilled spirits are a prime example of this. Although distillers may not be a "group inherently suspect of criminal activities," they are involved in a business which is subject to extensive state and federal controls. In Michigan, the liquor industry is an area permeated with statutory requirements, the violation of which can be criminally punished. *See, e.g.*, Mich. Comp. Laws §§ 436.1, 436.2, 436.17, 436.19, 436.22, 436.32, 436.50. Moreover, at the time appellant was engaged in the illegal manufacture of distilled spirits, there was a statutory requirement that certain internal revenue offices maintain a list of persons who had paid the special taxes assessed on the manufacture of distilled spirits and that this list be furnished to any prosecuting officer of any state, county, or municipality upon request. 26 U.S.C. § 6107.[2] There

2. This provision was repealed, effective December 16, 1968, by Section 203 (a), Title II of the Gun Control Act of 1968, Pub. L. No. 90-618, 1968 U.S. Code Cong. & Adm. News 1423, but this does not affect the relevance of section 6107 to the substantiality of the risk of self-incrimination confronting appellant at the time of his illegal activity. *See Albertson* v. *SACB*, 382 U.S. 70, 77 (1965). Furthermore, although the internal revenue service is no longer required to compile a list of persons who pay the special alcohol taxes and to furnish this list to prosecuting officials, "neither has

is therefore sufficient attention focused on manufacturers of distilled spirits to indicate that the hazards of self-incrimination attendant on compliance with the disclosure provisions of the alcohol tax laws would be more than "merely trifling or imaginary."

The important inquiry then is whether, in reality, these hazards ever would materialize. *Cf. Leary* v. *United States*, 395 U.S. 6 (1969); *Buie* v. *United States*, No. 271 (U.S., Dec. 8, 1969); *Minor* v. *United States*, No. 189 (U.S., Dec. 8, 1969). The majority concludes that this is "greatly to be doubted" because a prerequisite to compliance with the disclosure provisions of the alcohol tax laws is the securing of a basic permit, 27 U.S.C. § 203(b)(1), and the Secretary of the Treasury is prohibited from issuing a basic permit when "the operations proposed to be conducted . . . are in violation of the law of the State in which they are to be conducted." 27 U.S.C. § 204(a)(2)(C).

The effect on the privilege against self-incrimination of practical barriers to actual compliance with provisions requiring disclosure of illegal activity depends on the nature of the barriers. In *Leary* v. *United States*, *supra*, the Government contended that there was no substantial risk of self-incrimination because one who intended unlawfully to purchase marihuana would know he could not obtain the order form which contained the incriminating questions and consequently never would apply for it. The Government also contended that even if the buyer did apply for an order form, it was doubtful that the unsuccessful application would be revealed to law enforcement officials. *Id.*, at 18-20. The Supreme Court rejected both of these con-

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Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax." *Grosso* v. *United States*, 390 U.S. at 66. *See Marchetti* v. *United States*, 390 U.S. at 60, n. 18.

tentions and concluded that "real and appreciable" hazards of self-incrimination did confront Leary because the Congressional intent, as revealed by the statutory scheme adopted, was that an unlawful purchaser of marihuana should be able to obtain an order form.

On the other hand, in *Buie* v. *United States*, *supra*, the Court decided that the practical barriers encountered by one who unlawfully sold marihuana were sufficiently insurmountable to preclude any real possibility that he actually would comply with the order form requirements and thereby incriminate himself. Indeed, it was the Court's earlier decision in *Leary* that reduced the hazards of self-incrimination to the point where they were "imaginary and unsubstantial" as far as the seller was concerned because its decision relieved the purchaser of marihuana of his obligation of obtaining the order form and of providing the seller with an opportunity to comply with its requirements and thereby incriminate himself. *Buie* v. *United States*, *supra* at 2 - 4 of slip. op.

The practical barriers to compliance confronted by appellant in the instant case are not as artificial as those in *Leary*, but neither are they as substantial as those in *Buie*. Although a basic permit is a prerequisite to the lawful manufacture of distilled spirits, the absence of such a permit might not preclude appellant from complying with the provision requiring him to post a sign at the site of the still. 26 U.S.C. § 5180(a). Under the terms of the statute and the regulation adopted pursuant thereto, appellant apparently could have complied with this requirement merely by fabricating a sign containing the required information and installing it. *See* 26 C.F.R. § 201.235. Since "a sign placed conspicuously on the outside front or entrance [of the still] and exhibiting in readily legible and durable characters (a) the real name of the proprietor, (b) the

plant number, and (c) the designation of the kind of business", 26 C.F.R. § 201.235, would disclose the operation of the still, I think the hazards of incrimination attendant on compliance with 26 U.S.C. § 5180(a) are "real and appreciable". Accordingly, I would hold that appellant cannot be criminally punished for his failure to comply with this statutory provision.

The necessity of a basic permit and the prohibition on its issuance if the proposed operation violates the laws of the state probably would foreclose "literal and full compliance" with the statutory provisions requiring appellant to register the still and to file a qualification bond. 26 U.S.C. §§ 5179(a), 5173(a). However, the basic permit requirement would not prevent appellant from *attempting* to comply with the registration and qualification bond provisions by submitting an application. There is no statutory requirement that a distiller obtain a basic permit prior to filing an application for registration and a qualification bond.[3] Also, pursuant to 26 U.S.C. § 5171(a), "Every person *shall, before commencing* or continuing the business of a distiller . . . make application" for the registration of his still. (Emphasis added). Accordingly, under the statutory scheme adopted by Congress, a distiller can file the registration form and qualification bond simultaneously with his request for a basic permit. Moreover, the likelihood that a distiller would do this is increased by the fact that he can lawfully obtain distilling apparatus prior to securing a basic permit.

Similarly, appellant also would not be precluded from *attempting* to procure the revenue stamps which must be affixed to containers of distilled spirits. 26 U.S.C. § 5205 (a) (2). Again, the likelihood of "literal and full compli-

3. The qualification bond is filed at the same time as the application for registration. 26 U.S.C. § 5173(a).

ance" is small, since the purpose of the stamps is to evidence compliance with the provisions of the alcohol tax laws. However, in determining whether appellant would attempt to comply with this requirement, and with those imposed by sections 5179(a) and 5173(a), I doubt that we are permitted to speculate that, in reality, he would not attempt to obey the law. Implicit in the Supreme Court's decision in *Leary* is the notion that regardless of whether, in reality, one who purchases marihuana illegally would attempt to obtain an order form, the Court, in analyzing the substantiality of the risks of self-incrimination, would assume that this was a realistic alternative for the purchaser.[4]

Therefore, even with regard to the registration, qualification bond, and revenue stamp requirements, the hazards of self-incrimination confronting appellant were greater than those confronting Buie. In *Buie*, the Court concluded that the seller would never have an opportunity to complete the order form and disclose his illegal activity.[5] Appellant, on the other hand, by attempting to comply with the requirements of 26 U.S.C. §§ 5170(a), 5173(a) and 5205(a)

4. If the Court had not made this assumption, the substantiality of the risks of incrimination confronting Leary would have been no greater than those confronting Buie. In other words, if the Court took judicial notice of the fact that illegal purchasers of marihuana do not, in reality, attempt to comply with the requirement of obtaining an order form, the risks of self-incrimination confronting Leary would have been minimal. Accordingly, the significant distinction between *Leary* and *Buie* would seem to be that Leary could have attempted to obtain an order form and incriminate himself whereas Buie could not, since the obligation to procure the order form is on the purchaser. *See* 26 U.S.C. §§ 4705(a), 4742(a). In the present case, the various obligations imposed by the statutory provisions in question are on the distiller.

5. In *Buie*, the Court also observed that the statutory obligation to furnish the information requested on the order form was on the buyer and that this may eliminate the problem of "self-incrimination", as that term is ordinarily understood. In the present case it is the distiller himself who is obligated to disclose his activities.

(2), would reveal his intention to engage in the manufacture of distilled spirits.[6]

Of course, whether the potentially incriminating information provided by the attempt to comply would, in reality, ever be used by law enforcement officials to forge a "'link in the chain' of evidence tending to establish his guilt," *Marchetti* v. *United States, supra* at 48, and thus, whether the hazards of incrimination involved in such an attempt are "real and appreciable", involves some conjecture. The court has before it no factual data indicating the likelihood that the information contained in unsuccessful applications to register, to post the qualification bond, and to obtain revenue stamps is passed on to other law enforcement officials. However, in the absence of such data, I would resolve the doubts in favor of the applicability of the Constitutoinal privilege.

Until recently, an exchange of information between treasury officials and prosecuting officers of states, counties, and municipalities with regard to persons paying the special taxes assessed on the manufacture of distilled spirits was mandated by 26 U.S.C. § 6107. Thus, the channels of communication have been established. Moreover, although 26 U.S.C. § 6107 has been repealed, *see* n. 2, *supra*, there are still no restrictions imposed upon the use of the potentially incriminating information contained in

6. The fact that appellant would be revealing an intention to violate the law at some future time may reduce the substantiality of the risks of self-incrimination, but it would not make these risks trifling or imaginary. "We see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence . . . . [A]lthough prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination, this will scarcely always prove true." *Marchetti* v. *United States*, 390 U.S. 39, 54 (1968), overruling *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955).

an application for registration or a qualification bond form. *See Grosso* v. *United States*, 390 U.S. at 66.

It is also relevant that "other methods, entirely consistent with constitutional limitations," *Haynes* v. *United States*, 390 U.S. at 98, could be employed to obtain the information provided by compliance with the statutory provisions in question. *See generally Counselman* v. *Hitchcock*, 142 U.S. 547, 585 (1892). *See also Adams* v. *Maryland*, 347 U.S. 179 (1954); *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964). Thus, permitting appellant to invoke the privilege against self-incrimination in order to prevent criminal prosecution for failing to comply with these provisions would not "prevent the effective regulation or taxation by Congress" of distilled spirits. *Haynes* v. *United States*, *supra* at 98.

Accordingly, I would hold that sections 5170(a), 5173 (a) and 5205(a) (2),[7] as well as section 5180(a), compelled appellant, upon threat of criminal punishment, to disclose his illegal activities and that the hazards of self-incrimination which would have resulted from disclosure were "real and appreciable". I would therefore reverse his convictions on counts one, three, four, five and eight.

Combs, Circuit Judge. I concur in Judge McCree's dissent. I am unable to find within the rule of *Marchetti* any distinction between "moonshiners" and members of "the syndicate."

O'Sullivan, Senior Circuit Judge. I concur in Judge McCree's dissent. I do so because I believe that his opin-

7. The fact that counts 3 and 4 are directed at appellant's possession and transportation of unstamped containers, and not at his failure to obtain revenue stamps *per se*, is irrelevant, since the effect of 26 U.S.C. § 5205(a)(2) is to require a distiller to obtain revenue stamps in order to lawfully possess and transport distilled spirits in containers. *See Haynes* v. *United States*, 390 U.S. 85, 90-95 (1968).

ion is more consistent with *Marchetti* v. *United States*, 390 U.S. 39 (1968) than the carefully prepared opinion of Judge Edwards. I believe that, whether operating in Michigan, Tennessee, or elsewhere, "moonshiners" make up a "group inherently suspect of criminal activities" just as much as the "big time" gamblers who enjoy the protection of *Marchetti*. Emphasis is placed upon the fact that the alcohol tax laws are "essentially non-criminal". This is so, it is argued, because such laws exist primarily to raise revenue. Such laws do, however, provide *criminal* sanction for their violation and in most states, while the manufacture of distilled spirits is not totally forbidden, the activity for which this defendant was convicted—"moonshining"—is criminal activity wherever it is carried on.

Distinction is asserted to exist because the statute involved in *Marchetti* was purposely passed by Congress to interrupt criminal conduct—"big time" gambling carried on, in part at least, by "the syndicate", a part of organized crime. It is argued that Congress cannot impair the Fifth Amendment rights of those so engaged, but may forbid use of the Fifth Amendment by those who choose to violate the revenue laws relating to distilled spirits. The "moonshiner" has been as effectively deprived of the protection of the Fifth Amendment when he is convicted for failure to announce his intention to engage in criminal activity as is the interstate gambler, convicted for failure to register and disclose his intention to engage in crime. I am unable to discern legitimacy in the nuances employed to find distinction between the "moonshiner" and members of "the syndicate". So long as *Marchetti* is the law, it should be followed without discrimination.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF TENNESSEE,

NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal action no. 7073
WALTER R. GROOMS, DRURY WHITLOCK, CLAYTON WILLIAMSON, and BILLY BRUCE ALLEN,	)	
Defendants.	)	

MEMORANDUM AND ORDER

The defendants move the Court to suppress the testimony and other evidence of the federal undercover operative, William M. Reece, a special investigator of the alcohol, tobacco and firearms division of the Treasury Department, herein on the ground that the plaintiff cannot prosecute a defendant for a conspiracy where it is shown that an agent of the government participated in that conspiracy. There is no merit to this insistence.

The defendants urge as authority expressions by Circuit Judge Griffin B. Bell. However, that situation is not appropros of the case at bar. Therein, it was stated:

" * * * The fact that [the defendant] Sears' only connection with and knowledge of the unknown conspirators * * * was through a government informer (Davis) does not vitiate the conspiracy. * * * [G]overnment informers may serve as the connecting link between co-competitors * * * .

" [4,5] Although the evidence was sufficient to support the conspiracy charged, it was not the province of the jury to convict Sears merely upon finding that he had accepted money from Davis and furnished protection. This would establish only that Sears had combined with Davis, and as it takes two to conspire, there can be no indictable ~~conspiracy~~ with a government informer who secretly intends to frustrate the conspiracy. * * * In order to convict, it was incumbent upon the jury to find that Sears knew that there were others assisting Davis in his alleged whiskey activities. * * * * " Sears v. United States, C. A. 5th (1965), 343 F. (2d) 139, 142.

Here, the conspiracy is alleged to have involved the respective four defendants, and not to have involved a government agent who secretly intended to frustrate the conspiracy. In other words, the respective defendants are not charged with having conspired with a government agent who secretly intended to frustrate the conspiracy.

Motion DENIED.

FILE:

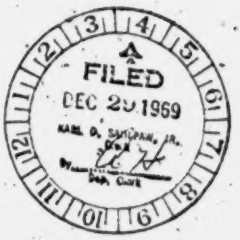
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF TENNESSEE

NORTHEASTERN DIVISION



UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	Criminal action no. 7073
	)	
WALTER R. GROOMS, ET AL.,	)	
	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER

The defendant Walter R. Grooms moved the Court to grant him a new trial herein. The Court has considered the motion and the grounds urged in its support and is of the opinion that same lacks merit.

There was positive testimony from the prosecution's witness William Reese, from which the jury could have found, directly and by reasonable inference, that Mr. Grooms willfully associated himself in a way with the criminal venture

under consideration by the jury, that he willfully participated in it as something he wished to bring about, and that he willfully sought by personal action to make it succeed. There was also other positive testimony, from which the jury might have found, directly or by reasonable inference, that Mr. Reese was mistaken in his identification of Mr. Grooms.

The Court instructed the jury as to this issue:

> With regard to the charges set forth in the second count and in overt act number five in the first count, Mr. Grooms claims that any conversation Mr. Reese may have had in front of his home on or about January 16, 1969 was not with him, but with his brother Charles Leroy Grooms.
>
> It is for you to say, under the evidence in the case, whether the testimony of Mr. Reese sufficiently identifies this defendant as the individual who engaged in the conduct under investigation, taking into consideration all the facts and circumstances shown by the evidence.

> Should you believe, from the evidence and circumstances proved, that there is reasonable doubt as to the identification of Mr. Walter Grooms, that is, that Mr. Reese was mistaken in his identification, then you would not be authorized to return a verdict against this defendant as to the second count, or on the first count -- if his conviction depends on proof of overt act number five.

Only the members of the jury could decide this issue on a trial by jury. United States v. Creek, C. A. 6th (1968), 403 F. (2d) 220, 220-221 [2], citing Butzman v. United States, C. A. 6th (1953), 205 F. (2d) 343, 349 [10], certiorari denied (1953), 346 U. S. 828, 74 S. Ct. 50, 98 L. Ed. 353. They were entitled to draw their own conclusions from all the evidence on this issue. Cf. Hickory v. United States (1894), 151 U. S. 303, 306, 14 S. Ct. 334, 38 L. Ed. 170, 173.

This defendant was taken in arrest under a warrant dated February 24, 1969. He was indicted on April 4, 1969. He was arraigned on

April 21, 1969, at which time his trial was assigned to commence on May 26, 1969. The trial commenced on that date. The first witness for the prosecution was a government investigator, William M. Reese.

During the cross-examination of this witness, he testified that, while at a certain tavern on a certain date, he purchased several receptacles of beer and drank some quantity of it and had a bottle of whiskey on a table. Counsel for the defendant asked for an interruption of the trial, in order that he might examine the official court reporter's notes to ascertain if the same witness had not testified differently on an earlier trial, in which such counsel had participated, as to the quantity of beer he had consumed on this occasion, and as to whether he had seen the whiskey.

The Court, being of the opinion (somewhat from also having heard the previous testimony of the witness Reese) that the effect of any such inconsistency pertained only to an unimportant detail, in the exercise of judicial discretion in the conduct of the trial, Quercia v. United States (1933), 289 U. S. 466, 469, 53 S. Ct. 698, 77 L. Ed. 1321, 1324 (headnote 1), declined to permit the trial to be interrupted and delayed for this purpose. As indicated hereinabove, counsel, who was familiar with the previous testimony of the witness he knew would testify herein, had ample pretrial time to arm himself with a transcript of earlier trial for possible use for purposes of impeachment. This Court accords counsel adequate time for preparation, assigns trial dates, where at all feasible, to accommodate the convenience of all concerned, and is known by the Bar to expect trial counsel

to be prepared to present their cases, once they announce "ready". Any error in this respect did not affect the substantial rights of the defendant Mr. Grooms, Rule 52 (a), Federal Rules of Criminal Procedure, and if of constitutional proportions, is believed to have been harmless beyond a reasonable doubt. Chapman v. California (1967), 386 U. S. 18, 24, 87 S. Ct. 824, 17 L. Ed. (2d) 705, 710-711 [7], rehearing denied (1967) 386 U. S. 987, 87 S. Ct. 1283, 18 L. Ed. (2d) 241.

The Court did not err in denying the pretrial motion of the defendant Mr. Grooms for a severance from his codefendants for trial. If Mr. Grooms' motion for a severance had been granted, and he had called his codefendant Mr. Whitlock as a witness in the severed trial, there is no reason to conclude that Mr. Whitlock would not have claimed his privilege against self-incrimination therein, as he did herein. United

State v. Carella, C.A. 2d (1969), 411 F. (2d) 729, 731 752 [7]. The probative value of any negative testimony from Mr. Whitlock, even if it were given, is doubtful.

Being without merit, the motion of the defendant Mr. Grooms for a new trial hereby is OVERRULED.

ENTER:

/s/ C. G. Neese
United States District Judge